IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.973 OF 2007.

Uttam Raosaheb Phadtare ...Appellant

Versus

Vithal Parashram Bhosale & Ors. ...Respondents

Shri Uday Warunjikar for the Appellant.

Shri Pradeep Gole for the Respondent No.1.

CORAM : ABHAY S.OKA, J.
DATED : 13th December, 2007.

P.C.:

1. Heard advocate for the appellant. The appellant is the original plaintiff. In a suit filed by the appellant, a decree for possession was passed. In execution of the decree, the appellant obtained possession of the suit property from the first respondent. Thereafter in an appeal preferred by the first respondent, the decree for possession has been set aside and the suit has been remanded back to the trial Court. The respondent applied for restitution. The said application was allowed and the order of restitution passed by the trial Court has been confirmed in appeal.

2. The submission of the learned advocate for the appellant is that the decree for possession passed in

favour of the appellant has not been finally set aside and an order of remand has been passed to enable the original defendant No.2 to file written statement. He submitted that section 144 of the Code of Civil Procedure, 1908 can be invoked only when the decree for possession is finally set aside. Secondly, he submitted that unless the first respondent establishes his entitlement to obtain possession, an order of restitution cannot be passed. Lastly, he submits that now the suit itself is fixed for recording of evidence, and therefore, till the disposal of the suit, the possession of the appellant may be protected.

3. I have considered the submissions. It is not in dispute that the first respondent was dispossessed in execution of the decree passed in favour of the appellant. The said decree has been set aside. The provision of section 144 of the said Code is not qualified by saying that while setting aside the decree, the suit has to be dismissed. Section 144 of the said Code comes into operation immediately after the decree is set aside. Therefore, in the present case section 144 of the said Code was certainly applicable.

4. When it is an admitted position that the first respondent was dispossessed in execution of the decree

which has been now set aside, the first respondent is entitled to restitution as a matter of right. Once decree passed in favour of the appellant is set aside, the appellant cannot retain the benefits acquired under the decree.

5. Right of restitution of the respondent cannot be denied only because the suit is fixed for hearing. No substantial question of law arises. Second Appeal is accordingly dismissed. The trial Court is directed to dispose of the Regular Civil Suit No.112 of 1980 as expeditiously as possible and in any event on or before 30th April, 2008.

JUDGE